

STATE OF MICHIGAN
COURT OF APPEALS

GLENN R. UNDERWOOD,

Plaintiff-Appellant,

v

LYNDA CARTO,

Defendant-Appellee.

UNPUBLISHED

August 28, 2014

No. 315949

Oakland Circuit Court

LC No. 2012-131130-CB

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Plaintiff, Glenn R. Underwood, appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) in favor of defendant, Lynda Carto, on res judicata grounds. This case is Underwood's second suit against a plaintiff involved in a 2004 lawsuit, which resulted in a judgment against Underwood. We affirm the trial court's grant of summary disposition, and we determine that Underwood's appeal is vexatious. We remand for a determination of sanctions under MCR 7.216(C). We further direct the Clerk of this Court and the trial court not to accept, and to return without filing, any further filings by Underwood in any non-criminal matter until Underwood has paid all necessary fees and sanctions and his filings fully comply with the court rules.

I. FACTS

A. THE 2004 CASE

Carto and Underwood are siblings. In 2004, Carto and other siblings sued Underwood, Charles Underwood, and Underwood Property Management Company, a sibling partnership that owned and managed numerous real estate properties.¹ The 2004 case involved Underwood's administration of Underwood Property Management, which was a sibling partnership, and his dispersal of funds to care for his disabled brother, John Underwood. The 2004 suit resulted in a

¹ *Carto v Underwood Prop Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747), p 2.

judgment of \$392,752, plus interest, against Underwood. In June 2008, a panel of this Court remanded for recalculation or clarification of damages.²

After remand, the trial court appointed Thomas Carroll, a certified public account (CPA), as an expert to assist it in properly calculating damages. On the basis of Carroll's calculations, on November 15, 2010, the trial court issued a revised judgment of \$200,823 against Underwood. Underwood moved for reconsideration of the trial court's revised judgment. When the trial court denied his motion for reconsideration, Underwood moved for reconsideration of its denial of reconsideration.

On May 18, 2011, the trial court denied Underwood's second motion for reconsideration. Underwood then moved the trial court for reconsideration of its May 18, 2011 order denying reconsideration. On September 19, 2011, the trial court denied Underwood's third motion for reconsideration. On April 26, 2012, the trial court denied Underwood's motion for relief from judgment, noting that Underwood had repeatedly raised issues that it had already determined. Between May 11, 2010, and September 18, 2012, Underwood filed in this Court claims of appeal from the trial court's orders, which this Court dismissed as untimely, and motions for reconsideration in this Court, which this Court denied as meritless.³

B. OTHER CASES DISMISSED ON RES JUDICATA GROUNDS

In 2009, Underwood petitioned the trial court to open the estate of John Underwood to resolve issues involving his care.⁴ The trial court denied the petition.⁵ In December 2010, a panel of this Court affirmed the trial court's decision on statute of limitations and res judicata grounds.⁶ The panel explained that the 2004 case resolved the issues regarding John Underwood's care.⁷

² *Id.*, unpub op at 13.

³ *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered May 11, 2010 (Docket No. 298311); *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered June 30, 2010 (Docket No. 298311); *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered December 29, 2011 (Docket No. 306501); *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered July 24, 2012 (Docket No. 310361); *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered October 24, 2011 (Docket No. 306501); *Carto v Underwood Prop Mgt Co*, unpublished order of the Court of Appeals, entered September 18, 2012 (Docket No. 310361).

⁴ *In re Underwood Estate*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 291852), p 4.

⁵ *Id.*, unpub op at 1.

⁶ *Id.*

⁷ *Id.*, unpub op at 1-2.

On February 18, 2010, Underwood filed a civil complaint against Patricia Selent, a plaintiff in the 2004 case, on theories of failure to account, self-dealing, breach of fiduciary duty, negligence, fraud, conspiracy, and slander.⁸ The trial court granted summary disposition in favor of Selent on res judicata grounds.⁹

On October 20, 2011, a panel of this Court affirmed the trial court's decision.¹⁰ The panel noted that "this is at least the third time that [Underwood] has brought suit against the same defendant."¹¹ The panel quoted this Court's prior decision in *Underwood Estate* to explain why Underwood's claims involved the same claims as in the 2004 case, or involved claims that could have been raised in that case.¹² This Court also stated that, "[e]ven though he is dissatisfied, [Underwood] cannot merely re-label and then couch his assertions in different arguments in repeated attempts to relitigate the same matter hoping for a result he finds more favorable." This Court stated that Underwood's "repeated attempts are a waste of judicial resources."¹³

C. THE CURRENT CASE

On December 14, 2012, Underwood sued Carto. Underwood generally alleged that the trial court in the 2004 case ignored facts, improperly appointed a CPA, and used procedures that denied him a fair trial. Underwood specifically alleged that Carto breached independent personal representative statutes, her fiduciary duties, and the partnership agreement; attempted to deny him an account in the sibling partnership, failed to account for capital contributions, and misled the partnership; obstructed justice by not attending the 2004 case's trial in 2006; conspired to sue Underwood and maliciously prosecuted him in the 2004 case; defrauded the court by submitted false financial information in the 2004 case; practiced law without a license; and slandered him at a May 18, 2011 hearing.

Carto moved for summary disposition under MCR 2.116(C)(7) and (10), asserting that res judicata barred Underwood's claims and that Underwood was merely "venting his anger on [Carto] causing further undue cost and vexation. . . . It is clear by his actions that Glenn Underwood is harassing the defendant and inflicting vexation through this frivolous law suit that has been previously tried and adjudicated." Carto attached the previous decisions of the trial court and this Court to her motion.

⁸ *Underwood v Selent*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2011 (Docket No. 298312), p 2.

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 3-4.

¹³ *Id.* at 4.

On April 5, 2013, the trial court granted Carto's motion on all claims but the slander claim. The trial court determined Underwood actually raised most of his claims during the 2004 litigation and that he could have raised the remainder of his claims. The trial court reserved its ruling on Underwood's slander claim and invited him to submit a supplemental brief to address whether the statute of limitations barred that claim. In his supplemental brief, Underwood claimed that the parties' pending litigation tolled the statute of limitations. On April 25, 2013, the trial court granted summary disposition, ruling that the statute of limitations barred the claim.

II. RES JUDICATA

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition,¹⁴ and reviews de novo whether res judicata bars a subsequent suit.¹⁵ A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of res judicata.¹⁶ We consider the contents of the plaintiff's complaint to be true unless contradicted by the documentary evidence.¹⁷ If reasonable minds could not differ on the legal effects of the facts, whether summary disposition is appropriate is a question of law.¹⁸

B. LEGAL STANDARDS

The doctrine of res judicata "prevents[s] multiple suits litigating the same cause of action."¹⁹ The purposes of res judicata is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."²⁰ Res judicata bars actions where "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."²¹

¹⁴ *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

¹⁵ *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

¹⁶ *Adair v State of Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004). See *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993).

¹⁷ *Odom*, 482 Mich at 466.

¹⁸ *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

¹⁹ *Adair*, 470 Mich at 121.

²⁰ *Pierson Sand & Gravel, Inc*, 460 Mich at 380 (quotation marks and citations omitted).

²¹ *Adair*, 470 Mich at 121.

C. APPLYING THE STANDARDS

Underwood contends that the trial court erred in dismissing his complaint on res judicata grounds because the claims were not actually litigated and he could not have raised them in the 2004 case. We disagree.

Michigan takes a broad approach to res judicata.²² “Res judicata bars every claim arising from the same transaction that the parties, exercising reasonable diligence, *could have raised but did not.*”²³ A plaintiff may not file a second suit in an attempt to litigate issues de novo simply because he or she missed the filing deadline for an appeal.²⁴

Here, Underwood’s complaint specifically based the majority of his claims on Carto’s conduct during the 2004 suit. Underwood could have raised these claims during the 2004 suit and actually *did* raise some of his claims during proceedings after this Court’s remand. Underwood’s failure to appeal that judgment does not entitle him to raise these claims in a separate lawsuit.

We conclude that the trial court properly granted summary disposition under MCR 2.116(C)(7) on res judicata grounds because Underwood could have raised his issues in the 2004 case.

III. STATUTE OF LIMITATIONS

A. STANDARD OF REVIEW

This Court reviews de novo the trial court’s determination on a motion for summary disposition,²⁵ and reviews de novo whether a statute of limitations bars a claim.²⁶

B. LEGAL STANDARDS

MCL 600.5805(9) provides that the statute of limitations for slander is one year. This period begins when the claim accrues, which is “at the time the wrong upon which the claim is based was done”²⁷ In pertinent part, MCL 600.5856 provides that the statute of limitations is tolled when the complaint is filed or jurisdiction is acquired over the defendant:

²² *Pierson Sand & Gravel, Inc.*, 460 Mich at 380; *Adair*, 470 Mich at 121.

²³ *Adair*, 470 Mich at 121 (emphasis added).

²⁴ See *Sewell v Clean Cut Mgt, Inc.*, 463 Mich 569, 571-572, 575-577; 621 NW2d 222 (2001) (the plaintiff could not base a new claim on wrongful eviction when the plaintiff did not appeal the eviction order in a previous suit).

²⁵ *Odom*, 482 Mich at 466.

²⁶ *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

²⁷ MCL 600.5827.

The statutes of limitations or repose are tolled in any of the following circumstances:

- (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
- (b) At the time jurisdiction over the defendant is otherwise acquired. . . .

C. APPLYING THE STANDARDS

Underwood asserts that the statute of limitations was tolled on his slander claim because he and Carto were engaged in a lawsuit at the time the alleged slander occurred. We disagree.

“[T]he statute of limitations is tolled during the time a prior suit is pending between the parties if the prior action is not adjudicated on the merits.”²⁸ Thus, the statute of limitations is tolled while parties litigate a claim in federal court, if the court dismisses the claim without prejudice.²⁹ This exception does not apply to different causes of action seeking different relief.³⁰

Underwood’s cause of action for slander is separate from the parties’ prior legal proceedings, which could not have resolved the slander issue because the alleged slander occurred after the trial court issued its revised judgment. Thus, this cause of action is a different cause of action and the exception does not apply. Additionally, the trial court adjudicated the prior suit involving Underwood and Carto on the merits. Thus, this case does not fit the requirement that the case was not adjudicated on the merits.

We conclude that the trial court properly determined that the statute of limitations barred Underwood’s claim because the parties’ litigation in the 2004 case did not toll it.

IV. VEXATIOUS APPEAL

A. LEGAL STANDARDS

MCR 7.216(C)(1) provides that this Court may assess damages or take disciplinary action when a party files a vexatious appeal:

The Court of Appeals may, on its own initiative . . . assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

²⁸ *Roberts v City of Troy*, 170 Mich App 567, 581; 429 NW2d 206 (1988).

²⁹ *Id.*

³⁰ See *Lenz v Detroit*, 376 Mich 156; 135 NW2d 904 (1965) (the plaintiff’s action seeking damages was not tolled while the plaintiff sought equitable relief).

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; . . .

B. APPLYING THE STANDARDS

We determine that Underwood's appeal is vexatious because it was taken for the purposes of hindrance and without any reasonable basis for belief that there was a meritorious issue for this Court to determine on appeal. This is the third appeal in which this Court has affirmed the trial court's dismissal of suits related to or based on conduct in the 2004 case on res judicata grounds. And this is the second appeal from a complaint against one of the plaintiffs in the 2004 case.

The panel's decision in *Selent* informs our determination. In *Selent*, Underwood sued Selent, another sibling involved in his 2004 lawsuit, on substantially claims as he made against Carto in this lawsuit.³¹ The trial court dismissed Underwood's suit against Selent on res judicata grounds.³² Underwood appealed that dismissal, and a panel of this Court affirmed the trial court's dismissal in no uncertain terms. The *Selent* panel explained that res judicata barred Underwood's claims, "for the same reasons clearly and succinctly stated by the previous panel of this court in *In re Estate of Underwood* when [Underwood] brought the case for the second time[.]"³³ The panel further warned Underwood that he could not repeatedly attempt to relitigate the issues in the 2004 case and that his repeated lawsuits wasted judicial resources.³⁴

Despite this Court's decision in *Selent*, Underwood filed a new lawsuit against a different sibling involved in the 2004 case. Underwood's suit in this case presents substantially the same allegations against Carto as he presented against Selent: allegations that a panel of this Court painstakingly explained were barred by res judicata. The most reasonable explanation for Underwood's behavior is that he has engaged in it for the purposes of hindrance. Further, Underwood cannot have a reasonable basis for believing that there is a meritorious issue to be determined. This Court has twice explained that res judicata bars all claims related to the 2004 lawsuit. But Underwood explicitly based his December 2012 complaint in this case on Carto's alleged conduct during the 2004 lawsuit.

This Court does not condone vexatious and frivolous appeals.³⁵ Pursuant to MCR 7.216(C)(2), we remand this case to the trial court to determine Carto's actual damages and expenses for defending against Underwood's appeal. Further, we order the trial court to assess

³¹ See *Selent*, unpub op at 2.

³² *Id.* at 1.

³³ *Id.* at 3.

³⁴ *Id.* at 4.

³⁵ See *Richardson v Detroit Auto Inter-Ins Exch*, 180 Mich App 704, 709; 447 NW2d 791 (1989); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169-170; 550 NW2d 846 (1996).

punitive damages in an additional amount equal to Carto's actual expenses. Finally, we direct the Clerk of this Court and the trial court not to accept, and to return without filing, any further filings by Underwood in any non-criminal matter until Underwood has paid all necessary fees and sanctions and has submitted his filings in full compliance with the court rules.

V. CONCLUSION

We conclude that the trial court properly granted summary disposition on Underwood's claims under MCR 2.116(C)(7) because res judicata and the statute of limitations barred the claims.

We affirm, but remand to the trial court for an award of actual and punitive damages under MCR 7.216(C). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot